No. 2748

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COUNTY OF HAWAII,

Plaintiff in Error,

vs.

HALAWA PLANTATION, LIMITED
(a corporation),

Defendant in Error.

REPLY OF DEFENDANT IN ERROR TO SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

S. H. DERBY,
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Filed this.....day of June, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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The supplemental brief of the plaintiff in error in this case deals mainly with three propositions, namely: (a) the weight to be accorded to the decision in *Matsumura v. County of Hawaii,* 19 Haw. 18; (b) the effect or non-effect of the failure of the territorial legislature to amend the County Act to meet said decision, and (c) the nature of counties in Hawaii. The scope of the supplemental brief is somewhat larger than the request for leave to submit it indicated, and the fact should be borne in mind that it has to be answered by local counsel in San Francisco who have not the advantages that attorneys on the spot would have. However, we shall pass all of this over

and endeavor to briefly meet the points made to the best of our ability.

I.

THE EFFECT OF THE MATSUMURA DECISION ON THE PRESENT CASE.

Counsel for the County of Hawaii in his supplemental brief contends that the rule laid down in the cases on pages 20 and 21 of our main brief does not apply to cases of appeals from territorial courts. This may be true if it means that a federal court is not absolutely bound by a decision of a territorial court construing territorial laws in the same way as it is bound by a decision of a state court construing state laws. Nevertheless the difference is simply one of degree, and very great weight is given to the decisions even of ordinary territorial courts, where local laws are in question.

This is well illustrated by the case of *Copper Queen Consolidated Mining Co. v. Territorial Board of Equalization of the Territory of Arizona,* 206 U. S. 474; 51 L. Ed. 1143. In that case the legislature of Arizona enacted a law which which had been previously enacted by the State of Colorado. When the Act came under consideration in the court, however, the Supreme Court of the Territory of Arizona refused to construe the Act as it had been previously construed by the Supreme Court of the State of Colorado in spite of the well known principle that, where a law of one jurisdiction is enacted in another jurisdiction, the construction given said Act in the

former jurisdiction will usually be followed. The Supreme Court of the United States affirmed the judgment of the Arizona court upon the ground that it was a construction of a local statute to which the United States Supreme Court would naturally lean, whether its own opinion was otherwise or not.

We contend that the rule applicable to territorial courts in general should be even more strictly adhered to in the case of appeals from the Supreme Court of the Territory of Hawaii. It must be remembered in this connection that Hawaii has a civilization older than that of many of the states of the Union. The first volume of Hawaiian Reports was published in 1857 and covered decisions for a period of ten years prior to that time. By the time the Islands were annexed to the United States a complete system of jurisprudence had grown up, which placed Hawaii in a very different position from newly organized territories of the United States. Congress recognized this distinction in passing the Organic Act for the government of the Territory of Hawaii, and it nowhere more fully recognized it than in Section 86 of said act, which provided in part as follows:

> "The laws of the United States relating to appeals, writs of error, removal of causes and other matters and proceedings as between the courts of the United States and the courts of the several states shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

This law was changed in only one respect by the amendment of the Organic Act in 1905, and that was by providing that writs of error and appeals might

be taken to the United States Supreme Court where the amount involved exceeded the sum of five thousand dollars. This provision was very recently changed so as to confer appellate jurisdiction on this court instead of the Supreme Court of the United States. It is readily apparent, therefore, that considerable distinction should be made between the decisions of the Supreme Court of the Territory of Hawaii and the decisions of ordinary territorial courts. It is also readily apparent that the present case is before this court *not because any provision of the County Act, a purely local law, is involved,* but simply because the injury to plaintiff's cane field amounted to more than five thousand dollars.

There is a question of contributory negligence in the case and on this question, as well as other questions of a similar character, we quite recognize that this court should exercise its own judgment entirely and that it is in no way bound by the decision of the Supreme Court of Hawaii in so doing. We earnestly contend, however, that, on the question of the construction which is to be given to the laws passed by the local legislature of the Territory of Hawaii, the decision of the Supreme Court of that territory, if not controlling, is at least one to which the very greatest weight should be given.

Counsel for the County of Hawaii refers in his brief to several decisions of the United States Supreme Court which were referred to by us in oral argument, and also to other decisions. It seems to us that these decisions make strongly for the contention which we are now advancing. The first of these de-

cisions is the case of *Keahola v. Castle,* 210 U. S. 149; 52 L. Ed. 998. In that case the Hawaiian Supreme Court held, following an earlier decision, that a law legitimating children borne out of wedlock upon the marriage of their parents was not applicable to the issue of an adulterous relation. As will be observed from a reading of the cases, the previous Hawaiian decision on this point was in conflict with the decisions of practically all the states of the Union. Nevertheless the United States Supreme Court held that it was a matter of local law, and that the decision of the court on the spot should be followed.

The next case referred to by counsel is the case of *Cotton v. Hawaii,* 211 U. S. 162; 53 L. Ed. 131. This case involved the question of what constituted a final judgment in the Territory of Hawaii and the United States Supreme Court, in following a Hawaiian decision which was promulgated a considerable time after a right of appeal to the Supreme Court of the United States had been given, said *inter alia*:

> "The statutes, it will be observed, confer no express power upon the Supreme Court of the Territory to enter a final judgment in a cause upon the overruling of exceptions, and, indeed, that the Supreme Court of the Territory does not construe the territorial statutes as giving it such authority, and, therefore, that the court could not have intended to exert such power in this case, so conclusively appears from recent decisions of the Supreme Court of Hawaii as to leave the question *not open to controversy.*"

Later, in the same opinion, the Supreme Court of the United States expressly points out that it is apply-

ing the construction given by the Supreme Court of Hawaii to the local statutes of that territory.

We will refer next to the two Atcherly cases. In the first of these, *Lewers & Cooke v. Atcherly,* 222 U. S. 285; 56 L. Ed. 202, the court held that it would follow the decision of the Hawaiian Supreme Court to the effect that a judgment of the Land Commission of Hawaii could not be attacked except by a direct appeal to the Supreme Court of the territory, as provided by law. In its opinion in this case the Supreme Court of the United States points out very forcibly the great weight which should be given to the opinion of the court upon the spot in construing local laws, and also points out the special reasons for following this course in the case of the courts of Hawaii.

The same question which was involved in the above case came again before the Supreme Court of Hawaii in the case of *Kapiolani Estate v. Atcherly,* 21 Haw. 441. In that case the Supreme Court of the territory came to the conclusion that its previous decision in the case of *Lewers & Cooke v. Atcherly,* which had been affirmed by the United States Supreme Court, was erroneous, and that, as a matter of fact, the plaintiff was entitled to go behind the judgment of the Land Commission referred to in that case. The Supreme Court of Hawaii stated that it would reverse its previous decision, therefore, except for the fact that it was bound by the affirmance of that decision by the Supreme Court of the United States, using in part the following language:

> "It makes no difference that in making that decision the Supreme Court followed the opinion of this court upon a matter of *local law,* and that we now believe that that opinion was not well founded. If the former ruling is to be reversed, the reversal is to be made by that court, and not this. The most that we can do now is to respectfully point out wherein, in our judgment, the former opinion was wrong. This we have done, believing it was our duty to do it, and with this our duty in the premises ends."

This case was also taken to the United States Supreme Court, which held that, as the Hawaiian Supreme Court now took a different view of the effect of the Land Commission award in question, it would follow such new view, even though contrary to its previous decision, and, therefore, it reversed the decision of the Hawaiian Supreme Court and ordered that judgment be entered in the way said court had held the same should have been entered, if it had not been bound by the earlier decision of the Supreme Court of the United States.

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The final case to which attention is called is the case of *John Ii Estate v. Brown,* 235 U. S. 342; 59 L. Ed. 259. In that case, as stated by counsel for plaintiff in error, the construction given by the Supreme Court of the Territory of Hawaii to a will written in the Hawaiian language was sustained as against the construction given by the federal court of the territory and affirmed by this court, and yet, from an examination of the will in question, it is very apparent that the construction given it by the Hawaiian Supreme Court was clearly wrong, and the construc-

tion by the federal courts in question was as clearly right.

In view of the above decisions we submit that this court should follow the decision in the Matsumura case, especially when it is further considered that said decision was re-affirmed in 19 Haw. 496, and again in the case at bar. As pointed out by counsel for the plaintiff in error himself, the County Act of the Territory of Hawaii is very different in a great many respects from the County Acts of the various states. Hence, the construction given to that different Act by the highest court of the territory in which the same was passed should, in our opinion, be accorded controlling weight. And when it is further considered that the rule that ordinary counties are not liable for torts is a rule based on a misapprehension of the early case of *Russell v. Men of Devon,* and has been recognized by most of the text writers as wholly erroneous in principle, the reasons for following the decision of the local court become even stronger.

It is submitted that to reverse the decisions of the local courts on matters of local law in a case which has come to this court, not because such local law is involved but simply because there is over five thousand dollars in controversy, would be to create an extremely bad precedent. We submit, therefore, that the Matsumura decision should be accorded controlling weight on this appeal.

II.

THE EFFECT OF THE FAILURE OF THE LEGISLATURE OF THE TERRITORY OF HAWAII TO AMEND THE COUNTY ACT TO MEET THE MATSUMURA DECISION, ALTHOUGH AMENDING IT IN NUMEROUS OTHER RESPECTS.

As pointed out in the addendum to our main brief, the legislature of the Territory of Hawaii has met in four regular sessions since the Matsumura decision was handed down, and has failed to amend the County Act to meet said decision. As also pointed out in said addendum, the legislature has amended said Act in numerous other respects, including the very section under which the Matsumura case and this case were brought. The presumption is very strong, therefore, that the legislature has acquiesced in the construction given the law in that decision and, indeed, the Supreme Court of Hawaii so holds in the case at bar (Record, p. 304).

None of the cases referred to in the supplemental brief make in any way against the above principle, but they in fact all support it either affirmatively or by inference. Hence, further discussion of the authorities seems useless. Counsel, however, refers to some of the cases as involving "some affirmative act" of the legislature and a "re-enactment" of the statutes involved and seeks to distinguish them on this ground. These considerations, however, are not absent but present in the case at bar. In the first place the territorial legislature has repeatedly amended the County Act and yet has not sought to meet the Matsumura decision. In the second place the County Act has been practically *re-enacted,* as will now be pointed out.

By Act 11 of the Hawaiian Session Laws of 1913 a commission was appointed to compile the various laws of Hawaii, said Act, as will be seen from a casual examination of the same, giving the Commissioners extremely wide powers (see Revised Laws of Hawaii, 1915, p. 5). The compilation was duly prepared, and in the preface thereof (id. p. 3) the following significant statement appears:

> "The general plan of the work follows that adopted by the compilers of the Revised Laws of 1905, which work marked a long step in advance in the matter of *the enactment of statutory law* in this jurisdiction, and has given general satisfaction to the courts and the bar of this territory. The last revision, therefore, forms the basis of this, obsolete and repealed matter being omitted and new matter contained in the Session Laws of 1905 to 1913 being incorporated. The most important of the new legislative enactments, *the county act of 1905, and the municipal act of 1907, as amended and supplemented by later legislation,* have been included, with certain chapters and sections contained in the Revised Laws of 1905 which the commission believed to have been amended by implication by the legislation mentioned under three titles, designated respectively 'County Government', 'Municipal Government', and 'Provisions Common to Counties and City and County'."

Furthermore, under Section 1503 of the compilation (p. 630), dealing with the powers and liabilities of counties, we find the following significant note:

> "County is liable for injury to private property caused by negligent act of a road employee: 19 H. 18; 19 H. 496."

The Revised Laws of Hawaii, 1915, with the foregoing construction placed on them, were duly enacted into law by the following session of the legislature.

Hawaiian Session Laws of 1915, Act 7, p. 6.

Finally to clinch matters, the local court in the case at bar has held that the effect of the action of the local legislature has been to sanction the Matsumura decision (Record, p. 304). It would be hard to imagine a case more compelling as regards legislative and judicial sanction of a decision.

Counsel for the county claims, however, that the legislature could have done nothing to meet the situation. He claims that it could not have provided that the County Act should not be construed so as to make counties liable for torts because this would be usurping judicial functions, and he then claims that an Act directly relieving counties from liability for torts would have been unconstitutional. To state such an argument is, in our opinion, to refute it and no cases are cited which lead to any such conclusion. If a legislature may pass a law it may certainly provide, if it does so directly, how its provisions shall be construed, and such construction will undoubtedly be binding on the courts as to cases arising thereafter (see *36 Cyc.*, 1105-1106). And if, as counsel claims, the weight of authority is that counties are not liable for torts, a legislative Act declaring them not so liable could hardly be held unconstitutional. Counties created solely by legislative action can surely be given such immunities as the will of their creator endows them with.

We submit that the contentions in question call for no further discussion.

III.

THE NATURE OF COUNTIES IN HAWAII.

Counsel for the county in his supplemental brief makes a searching and careful analysis of the County Act, with which we shall not attempt to take issue. To us, however, the points made, if well founded, tend to show great limitations on the powers usual to counties, and tend to liken such counties to mere municipalities. In fact such was the very argument advanced by Mr. Justice Ballou in the Matsumura case (19 Haw. at pp. 33-34). The peculiar nature of county organization in Hawaii is not, as counsel seems to think, a reason for applying the rule applicable to *ordinary* counties, but forms a cogent and controlling reason for deferring to the judgment of the court "on the spot" (Atcherly cases, supra), which alone is familiar with that peculiar organization.

Nor are the Hawaiian decisions cited on this point of any significance. The question arising in the Matsumura case did not arise in those cases and was not there decided. Nor is anything in those cases in conflict with the Matsumura decision (see especially concurring opinion of Judge Hartwell in *Territory v. Whitney,* 17 Haw. at pp. 188-190). And finally, if there were such conflict, the earlier decisions would be clearly overruled by the later one.

All of which, it is submitted, leads to the inevitable conclusion that the judgment should be affirmed.

Dated, San Francisco,
June 1, 1916.

Respectfully submitted,

S. H. Derby,

Of Counsel for Defendant in Error.